

PATRICIA K. SCHER

IBLA 81-354

Decided October 29, 1981

Appeal from decision of Nevada State Office, Bureau of Land Management, rejecting desert land entry application. N-23988.

Affirmed as modified.

1. Desert Land Entry: Applications -- Desert Land Entry: Water Right

A desert land entry application filed pursuant to the Act of Mar. 3, 1877, as amended, 43 U.S.C. § 321 (1976), is properly rejected where the applicant fails to provide evidence that the proposed system of impounding rainfall on the land in question and directing it to the plants by a system of canals and ditches would provide a permanent and feasible source of sufficient water for irrigation.

2. Desert Land Entry: Applications -- Desert Land Entry: Cultivation and Reclamation

A desert land entry application which provides that the crops for cultivation will be the century plant and the pinon pine tree is properly rejected because such species are not "crops" which would qualify the subject land for desert land entry.

APPEARANCES: Patricia K. Scher, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Patricia K. Scher has appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated December 9, 1980, rejecting her desert land entry application, N-23988, because the crops to be grown, century plants and pinon pine trees, are "arid land

species and can technically be grown without benefit of irrigation." BLM stated that the crops, therefore, do not satisfy the provisions of the Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1976), citing 43 CFR 2520.0-8(a)(1).

Appellant's application was filed with BLM on April 2, 1979, for 320 acres of land situated in secs. 18 and 20, T. 22 S., R. 59 E., Mount Diablo meridian, Clark County, Nevada. In the application appellant noted that the century plant and the pinon pine tree are "desert type plants," but that irrigation "increases yield and insures survival of the plants." She proposes to irrigate her crops by trapping rainfall and directing it to the plants by means of a system of reservoirs, canals, and ditches. <sup>1/</sup> Appellant estimates annual production costs at \$21,600. The area, located southwest of Las Vegas, adjoins a "major road," which allows ready access to local and national markets. Appellant estimates annual income at \$64,000, based on the production of 160 tons of "agave," selling at \$300 per ton, and 16,000 pounds of "pinon nuts," selling at \$1 per pound. Appellant intends to personally finance the proposed operation.

In her statement of reasons for appeal, appellant contends that many types of plants are "arid land species," including oats, onions, wheat, and dates, that century plants are "not native" to this area and that pinon pine trees "do not grow in the lower part of the [Las Vegas] Valley" because they need more moisture than is generally available, and, finally, that irrigation would cause century plants to grow from "a couple of inches" to "six to ten feet" and cause pinon pine trees to "produce 10 to 15 times the normal crop."

BLM properly rejected appellant's application. However, we believe that analysis of the statute and appropriate regulation provides an even stronger basis for rejection than that relied on by BLM.

[1] Section 1 of the Act of March 3, 1877, supra, provides for the entry of desert lands of the United States for the purpose of reclaiming them "by conducting water upon the same \* \* \* Provided, however, that the right to the use of water by the person so conducting the same \* \* \* shall depend upon bona fide prior appropriation." (Emphasis

<sup>1/</sup> Appellant describes the proposed operation as follows:

"The type of farming-irrigation will be similar to that used near rivers and lakes in this country. The excess surface water which runs on the ground will be channeled by ditches and canals to plants and to plastic bag reservoirs. The reservoirs will contain dump flow valves to allow water to enter the rear end of the reservoirs. The front end of the reservoirs will contain release valves to release the water when needed. Note: normal rainfall in this area produces enough water to fill reservoirs. Note: if rainfall is not normal then any farmer suffers. However, crops still will probably not be lost totally due to the nature of the crop to withstand without major water supply for a growing season or two." (Emphasis in original.)

added.) Similarly, the implementing regulation, 43 CFR 2521.2(d), provides in relevant part:

No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending entryman has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right, or, in States where no permit or right to appropriate water is granted until the land embraced within the application is classified as suitable for desert-land entry or the entry is allowed, a showing that the applicant is otherwise qualified under State law to secure such permit or right. [Emphasis added.]

Evidence of water rights, *i.e.*, the "right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought," is a vital prerequisite to approval of a desert-land entry application. See, *e.g.*, Dixie L. Bjornestad, 27 IBLA 201 (1976); Arthur J. Dunford, A-29307 (Mar. 26, 1963).

In order to constitute a valid appropriation of water "there must be an actual diversion of it, with intent to apply it to beneficial use, followed by an application to such use in a reasonable time." In re Manse Spring and Its Tributaries, 108 P.2d 311, 314 (1940), quoting Walsh v. Wallace, 67 P. 914, 917 (1902). Pursuant to 43 CFR 2521.2(d), an applicant for a desert land entry must, at the time of application, provide evidence that he has "already acquired by appropriation" or is taking steps to acquire a right to the permanent use of sufficient water to reclaim his entry. Appellant has failed to provide such evidence in this case.

In an early Departmental case concerning the water supply and irrigation system of a desert land entry claimant, John Robison, 44 L.D. 150, 151 (1915), it was stated:

The attempted irrigation system consists of a dam across a dry draw, and the retention of the water in a coulee, or low tract of land. This system or proposition of irrigation has been found very unsatisfactory by the Department, and the attempt of individual entrymen to obtain land under the desert land laws by such a system of irrigation has been found unsatisfactory and insufficient, except in a few very exceptional cases \* \* \*.

In commenting on the sufficiency of water necessary under the desert land laws, First Assistant Secretary Jones commented in Mullin v. Keaster, 44 L.D. 161, 168-69 (1915), as follows:

It goes without saying that a permanent and feasible source of water supply is absolutely essential under the desert land law, which requires of an entryman thereunder a full showing as to the source of such supply. This necessarily means that the source must be permanent and feasible, and that sufficient water is or will be available to irrigate and reclaim \* \* \*.

We find that appellant has failed to provide evidence that her proposed system would provide a permanent and feasible source of sufficient water for irrigation. Therefore, regardless of the types of crops to be grown appellant's proposed method of irrigation was insufficient.

[2] In addition, BLM correctly pointed out that the century plant and the pinon pine tree are not "crops" which would qualify the subject land for desert land entry. Both are arid land species which technically could be grown without the benefit of irrigation. See 43 CFR 2520.0-8(a)(i). Appellant has failed to provide any evidence that either species could be cultivated successfully on a commercial basis and, therefore, has failed to demonstrate the economic feasibility of her plan. See 43 CFR 2520.0-8(d)(3); see also United States v. Zwang, 55 IBLA 83, 92 n.5 (1981); Joanne F. Wright, 49 IBLA 237 (1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Bruce R. Harris  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Douglas E. Henriques  
Administrative Judge

